Filed 9/27/06 U.S. National Leasing v. Frazier Construction CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

U.S. NATIONAL LEASING, LLC, Cross-Complainant and Respondent, v. FRAZIER CONSTRUCTION, INC., Cross-Defendant and Appellant.	C050220 (Super. Ct. No. 03AS05569)

While working on a construction project, Donald Frazier fell to his death through unsupported fiber glass panels on the metal roof of a building in Depot Park. Donald Frazier owned cross-defendant Frazier Construction, Inc. (Frazier), which contracted with Depot Park owner and cross-complainant U.S. National Leasing, LLC (U.S. National) to do some construction work. Donald Frazier's widow and children filed a complaint against U.S. National seeking wrongful death and survivorship damages. U.S. National cross-complained against Frazier, asserting that the contract entered into between the parties

required Frazier to (1) purchase commercial liability insurance of at least $1 million naming U.S. National as an additional insured, and (2) indemnify and hold U.S. National harmless from claims arising out of performance.

The parties agreed to bifurcation of the issue of indemnity. Following a court trial, the court found the contract entered into between the parties was binding at the time of Donald Frazier's death; the indemnity language of the contract applied to the underlying wrongful death claims; the indemnity clause was not unconscionable; and U.S. National was entitled to indemnification from Frazier after trial of the wrongful death claim, unless Frazier could prove U.S. National was solely responsible for Donald Frazier's death. Frazier appeals, challenging each of the trial court's findings. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

U.S. National essentially owns and operates Depot Park, the site of the former Sacramento Army Depot. U.S. National leases the buildings to various commercial and industrial enterprises. Frazier was a tenant at Depot Park, operating as a general contractor. Donald Frazier served as president and CEO of Frazier; upon his death, Mrs. Frazier assumed those roles.

Mrs. Frazier and her three adult children filed the original complaint against U.S. National for wrongful death and

survivorship damages.[1] The complaint alleged Frazier agreed to perform construction services on a structure located at Depot Park, and U.S. National negligently failed to inspect and maintain the structure. U.S. National's negligence resulted in Donald Frazier's death when he fell through unsupported fiber glass panels on the metal roof of the structure.

U.S. National cross-complained against Frazier, alleging the written contract entered into by the parties required Frazier to purchase and maintain $1 million in commercial liability insurance naming U.S. National as an additional insured, and indemnifying and holding U.S. National harmless from claims arising out of performance of the work. The cross-complaint alleged that while performing the work, Donald Frazier "stepped on and fell through an open and obvious white plastic skylight," resulting in his death. In addition, the cross-complaint alleged Frazier's commercial liability insurer was in liquidation. The cross-complaint sought indemnity and declaratory relief as to the rights of the parties under the contract.

The parties agreed to bifurcate the cross-complaint for trial to decide the indemnity issues separately. The parties stipulated to the following facts at trial.

In May 2002 U.S. National solicited a bid from its tenant, Frazier, to install a frame for a roll-up door at the Depot Park

---

[1] Mrs. Frazier and her children are not parties in this appeal.

water tank storage area. Frazier submitted a bid on a form entitled "Proposal Contract," signed by Donald Frazier as president of Frazier.

U.S. National awarded Frazier the project. In June 2002 the parties signed a 21-page American Institute of Architects (AIA) form contract entitled "Abbreviated Standard Form of Agreement Between Owner and Contractor for Construction Projects of Limited Scope Where the basis of payment is a Stipulated Sum." The contract states it was "made as of the 31st day of May in the year Two Thousand Two." This form agreement was the only standard form construction project contract executed between U.S. National and Frazier.

On at least four subsequent occasions, U.S. National solicited proposals from Frazier. Each time Frazier responded with a "Proposal Contract" stating the cost of the project if it was awarded the project, along with an estimate itemizing the costs of material and labor. On each occasion U.S. National awarded the project to Frazier and notified Frazier it could proceed pursuant to the AIA form contract. One of the four projects involved the movement of posts and the reduction in size of a corrugated metal roof overhang. Donald Frazier fell to his death while working on this project.

In response to each Proposal Contract, U.S. National issued a "Notice to Proceed" to Frazier. Each Notice to Proceed states: "Pursuant [to] that certain Contract dated June 10,

2002 you are authorized to proceed to perform the work set forth on your Cost Proposal dated . . . ."[2]

Frazier purchased liability insurance pursuant to the agreement and named U.S. National as an additional insured. Sometime after Donald Frazier's death, the insurer went bankrupt.

More detail as to the dealings between the parties was provided by depositions of U.S. National's site manager, Dennis Wertz, and Mrs. Frazier. The parties stipulated to their admission at trial.

According to Mrs. Frazier, the parties enjoyed a very informal relationship. U.S. National's and Frazier's offices were next door to one another. Wertz would walk over and tell Frazier's estimator that "'I have this project I want you to bid on.'" Often no other bids were solicited. Frazier would prepare a Proposal Contract, and instead of signing an acceptance, U.S. National would later deliver a Notice to Proceed. The Notices to Proceed were hand delivered by Wertz to Frazier's estimator, who would tell Mrs. Frazier the start date for the work.

---

[2] One of the notices referred to the contract date as May 31, 2002, the actual agreement date recited in the preface of the AIA form contract. All of the others identified the agreement as dated June 10, 2002, the date the first Notice to Proceed was issued. The parties do not dispute that there was only one AIA form agreement executed by the parties between May 31, 2002, and June 10, 2002.

Wertz testified the Notices to Proceed were form letters from a word processing program. Mrs. Frazier had no conversations with anyone from either U.S. National or Frazier about the subsequent work done by Frazier being "under the first contract." Wertz did not specifically recall discussing with Donald Frazier that the subsequent jobs done by Frazier were to be done under the AIA contract previously signed.

The indemnity clause in the AIA contract provides, in pertinent part: "[T]he Contractor shall indemnify and hold harmless the Owner . . . from and against claims, damages, losses and expenses . . . arising out of or resulting from performance of the Work, provided that such claim . . . is attributable to bodily injury . . . or death, . . . but only to the extent caused by the negligent acts or omissions of the Contractor . . . regardless of whether or not such claim . . . is caused in part by a party indemnified hereunder."

Wertz testified somebody from his office hand delivered the AIA contract to Frazier. He did not discuss specific language, including the indemnity provision, in the contract with either Donald or Mrs. Frazier. Mrs. Frazier testified no one affiliated with U.S. National informed her of what would happen if a Frazier employee were injured on a U.S. National job.

Following the trial, the trial court made several rulings. The court found the original AIA contract was incorporated by reference in each of the subsequent projects: "Frazier Construction never objected to the reference in each new 'Notice to Proceed' and impliedly accepted the condition by subsequently

performing the work described by its proposal." Therefore, the court concluded, the AIA contract was binding on the parties at the time of the accident.

The court further determined the indemnity provisions in the AIA contract applied to the wrongful death claim against U.S. National. The court found the indemnity provision was not unconscionable and inured to the benefit of U.S. National. The court concluded: "Finally, the court finds Donald Frazier was engaged in the performance of the work called for by the contract as it is clear his presence on the roof of the subject property when the roof collapsed was directly related to Frazier Construction's successful proposal to make improvements to the structure."

In its judgment in favor of U.S. National, the court stated U.S. National was entitled to indemnification from Frazier in accordance with the AIA contract, after trial of the wrongful death claim, unless plaintiffs could prove to the satisfaction of the trier of fact that U.S. National was the party solely responsible for Donald Frazier's death. Following entry of judgment, Frazier filed a timely notice of appeal.

DISCUSSION

STANDARD OF REVIEW

Where the trial court construes a contractual indemnity provision, without the aid of extrinsic evidence, the interpretation of this provision is a question of law subject to de novo review. Since there is no conflict in the extrinsic evidence and therefore no issue of credibility, we make an

independent determination of the contract entered into between Frazier and U.S. National. Indemnity agreements are strictly construed against the indemnitee, here U.S. National. (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1277, fn. 8; *Goldman v. Ecco-Phoenix Elec. Corp.* (1964) 62 Cal.2d 40, 44.)

While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. The mutual intention of the parties at the time the contract is formed governs interpretation. If possible, we infer that intent solely from the written provisions of the insurance policy. If the policy language is clear and explicit, it governs. (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1074.)

"Unconscionability is ultimately a question of law for the court. [Citations.] It is true that numerous factual inquiries bear upon that question, e.g., the business conditions under which the contract was formed, and to the extent there are conflicts in the evidence or in the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the judgment. [Citations.] [Where] the extrinsic evidence [is] undisputed . . . we review the contract de novo to determine unconscionability." (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1055.)

AGREEMENT TO PROCEED UNDER THE AIA FORM CONTRACT

Frazier argues there was no agreement that the subsequent work would be governed by the initial AIA contract signed by the

parties. According to Frazier, U.S. National's Notices to Proceed were counteroffers that Frazier never accepted. In addition, Frazier argues U.S. National's payment for its services constituted an acceptance of Frazier's proposals.

U.S. National contends Frazier signed the original AIA form contract and drafted the Proposal Contracts on the four subsequent projects. U.S. National argues there is no evidence anyone associated with Frazier ever voiced any objection to the inclusion of the AIA contract into the terms applicable to the subsequent projects described in the later Notices to Proceed. The trial court agreed with U.S. National and found Frazier accepted the incorporation by failing to register any objection and by performing the work.

An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal, constituting a rejection terminating the offer. (Civ. Code, § 1585; *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557-559.)

Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal. (Civ. Code, § 1584.) The mutuality of the parties' consent must be determined by their words and acts, judged by a reasonable standard, which must manifest an intention to agree in regard to the matter in question. The real but unexpressed state of a party's mind on the subject is immaterial. Under this objective test, a "meeting of the minds" is unnecessary. A party may be bound even though the party misunderstood the terms of a proposed contract. (*Hilleary v.*

Garvin (1987) 193 Cal.App.3d 322, 327; *Myers v. Carter* (1963) 215 Cal.App.2d 238, 241.)

Generally, silence does not constitute an acceptance unless there is a relationship between the parties, such as a previous course of dealing between the parties under which silence would be understood as acceptance. Acceptance may be inferred from inaction in the face of a duty to reject a benefit, the retention of a benefit conferred, the past relations of the parties, or the offeror's having given the offeree reason to believe that acceptance would be manifested by silence. (*Southern Cal. Acoustics Co. v. C. V. Holder, Inc.* (1969) 71 Cal.2d 719, 722; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1385-1387.)

A written agreement may incorporate other written agreements by expressly referring to them. For the terms of another document to be incorporated into the document executed by the parties, the following conditions must be met: the reference must be clear and unequivocal, the reference must be called to the attention of the other party, the other party must consent to it, and the terms of the incorporated document must be known or easily available to the contracting parties. (*Baker v. Aubry* (1989) 216 Cal.App.3d 1259, 1264; *Holbrook v. Fazio* (1948) 84 Cal.App.2d 700, 701.)

Frazier contends its Proposal Contracts and U.S. National's Notices to Proceed are "stereotypical ships passing in the night." According to Frazier, its Proposal Contracts do not incorporate the AIA contract. The Notices to Proceed authorize

Frazier to begin work in accordance with the various Proposal Contracts and confirm the price of Frazier's proposals. Frazier argues there was no meeting of the minds since: "The Notices to Proceed authorize Appellant to begin work in accordance with its various Proposal Contracts, yet the Proposal Contracts say *nothing* about incorporating the language of the AIA form contract. There was no meeting of the minds that each of the five jobs done by Appellant at Depot Park, following the initial job, would be governed by the AIA form contract."

What Frazier omits in this discussion is the fact that each of the Notices to Proceed clearly and unequivocally incorporated the contract. Donald Frazier signed the original contract. There is no evidence he or anyone connected with Frazier objected to the inclusion of the contract into the terms applicable to each of the subsequent projects contained in the Notices to Proceed.

In addition, as U.S. National points out, Frazier never canceled the liability insurance endorsement that covered U.S. National as required by the contract. U.S. National contends the continuation of coverage throughout the subsequent work evidences Frazier's understanding that such coverage was a condition of doing work at Depot Park.

We agree. As the trial court pointed out, Frazier accepted the inclusion of the AIA contract in the latter projects by not objecting to its explicit inclusion in the Notices to Proceed and by completing the work as agreed upon. These facts, coupled with the retention of the liability insurance, support a finding

that Frazier accepted the inclusion of the contract in the latter Notices to Proceed and was therefore bound by the contract at the time of Donald Frazier's death.

Frazier argues that U.S. National's Notices to Proceed were counteroffers it never accepted. According to Frazier, it never communicated any acceptance to the additional terms of the Notices to Proceed. However, Frazier's silence, together with its completion of the contracted-for work, equals just such an acceptance.

Frazier also contends U.S. National's payment for its services, not the Notices to Proceed, constituted an acceptance of Frazier's proposals. Under Frazier's theory, since it received no benefit from the incorporation of the contract into the Notices to Proceed, Frazier's performance of the work cannot be considered a tacit acceptance of the inclusion of the AIA contract. However, Frazier provides no support for the assertion that inclusion of the AIA contract into the Notices to Proceed required some extra consideration on U.S. National's part toward Frazier. Nor does U.S. National's payment for the work ultimately done change the equation. Frazier sent work proposals to U.S. National. U.S. National responded with Notices to Proceed explicitly incorporating the AIA contract. Frazier, without objection to the Notices to Proceed, completed the work and was paid by U.S. National. The payment by U.S. National does not ameliorate or change the fact that Frazier performed the work pursuant to the Notices to Proceed, documents that include the AIA contract.

Nor does *Amer. Aero. Corp. v. Grand Cen. Aircraft Co.* (1957) 155 Cal.App.2d 69 (*Aeronautics*), cited by Frazier, compel a different result. In *Aeronautics*, the court found no evidence that the parties accepted and approved a proposed written contract. (*Id.* at p. 79.) According to the court: "Where a person offers to do a definite thing and another introduces a new term into acceptance, his answer is a mere expression of willingness to treat or it is a counter-proposal, and in neither case is there a contract; if it is a new proposal and it is not accepted it amounts to nothing." (*Id.* at p. 80.)

Frazier contends, as in *Aeronautics*, the parties had an informal method of dealing and had an agreement for the provision of services at a price quoted in Frazier's proposal. Frazier asserts: "When Respondent gratuitously added the incorporation of the AIA form contract in its Notices to Proceed, and when Appellant never expressed any assent to this incorporation, Respondent lost the ability to rely on the AIA form contract."

Frazier's argument overlooks basic contract law. Here, Frazier, a construction company, signed a contract with U.S. National that included an indemnity clause. Frazier complied with the clause, purchasing the required insurance. Subsequently, the parties agreed that Frazier would do additional work for U.S. National. In each Notice to Proceed, U.S. National clearly and unequivocally stated the latter projects would be governed by the contract. Frazier retained the required insurance, never expressed any reservations about

including the contract, and ultimately performed the work agreed to. Under these facts, Frazier agreed to go forward with subsequent projects with the full knowledge that this work would be governed by the contract.

APPLICATION OF INDEMNITY PROVISION

According to Frazier, the indemnity language of the AIA contract does not apply to the underlying wrongful death claims. Frazier argues that the trial court's finding to the contrary has the harsh effect of transforming a construction indemnity agreement into a release of U.S. National's liability, thereby extinguishing any wrongful death recovery by Donald Frazier's survivors.

Background

To address Frazier's claims, we set forth the relevant provisions of the AIA contract.

Paragraph 8.13.1, under "Indemnification," provides, in pertinent part: "To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 16.3, the Contractor shall indemnify and hold harmless the Owner . . . from and against claims . . . and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim . . . is attributable to bodily injury . . . or death, . . . but only to the extent caused by the negligent acts or omissions of the Contractor, . . . anyone directly or indirectly employed by them

or anyone for whose acts they may be liable, regardless of whether or not such claim . . . is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 8.13."

The contract also includes a paragraph titled "Safety Precautions and Programs." Paragraph 15.1 provides, in part: "The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to: [¶] .1 employees on the Work and other persons who may be affected thereby[.]"

Finally, paragraph 16.1, under the article titled "Insurance," requires the Contractor to purchase and maintain insurance for protection from claims for damages due to bodily injury, including death, "which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by the Contractor . . . ."

The Insurance section also states, in paragraph 16.3.3: "The Owner shall require the Contractor to include the Owner . . . as additional insureds on the Contractor's liability insurance under Paragraph 16.1 which shall include insurance as follows . . . ." The contract requires commercial general liability and, if necessary, commercial umbrella insurance with

a limit of not less than $1 million for each occurrence. The owner shall be included as an insured under the policy. "This insurance . . . shall apply as primary insurance with respect to any other insurance or self-insurance programs afforded to, or maintained by, Owner."

Discussion

We construe indemnity agreements under the same rules that govern the interpretation of other contracts. Therefore, we interpret the contract so as to give effect to the mutual intention of the parties as ascertained from the clear and explicit language of the contract. Unless given some special meaning by the parties, the words of a contract are to be understood in their ordinary sense. In interpreting an express indemnity agreement, we look first to the words of the contract to determine the intended scope of the indemnity agreement. Courts will enforce indemnity agreements even for losses caused by acts over which the indemnitor had no control. (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 504-505 (*Continental Heller*).)

Frazier argues that because a paragraph on indemnity in the contract specifically addressed claims by employees of the contractor, it, by exclusion, means that claims made by a principal of the indemnitor against the party to be indemnified are not included in the indemnity agreement. In support, Frazier cites paragraph 8.13.2 of the contract, which reads, in part: "In claims against any person or entity indemnified under this Paragraph 8.13 *by an employee of the Contractor*, . . .

anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 8.13.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor . . . under workers' compensation acts, disability benefit acts or other employee benefit acts." (Italics added.)

Frazier claims Donald Frazier as president and CEO of Frazier was not an employee and therefore the indemnity portion of the contract does not apply to him. We disagree.

As the trial court noted, Donald Frazier owned Frazier. However, the court also found: ". . . Donald Frazier was engaged in the performance of the work called for by the contract as it is clear his presence on the roof of the subject property when the roof collapsed was directly related to Frazier Construction's successful proposal to make improvements to the structure."

The evidence supports the trial court's finding that Donald Frazier was doing work for Frazier -- was, in fact, acting as Frazier's employee -- at the time of the accident. As Frazier's own trial brief puts it: "On October 31, 2002, 59-year-old contractor Donald Frazier (owner of Frazier Construction) fell 14 ½ feet to his death while inspecting a corrugated metal roof overhang (supported by metal columns) on a warehouse building located on the former Army Depot property . . . . The job in question was to involve relocation of the metal posts supporting the corrugated metal roof overhang."

Moreover, section 8.13.2 of the AIA contract does not state only employees are covered by the contract's indemnity provision. Section 8.13.2 states only that the duty to indemnify is not limited by other laws or benefit programs applicable to employees of the contractor. Section 8.13.2 provides that if an employee of the contractor sues the owner, the contractor's duty to indemnify will not be limited to the exclusive remedy limitations of workers' compensation. Section 8.13.2 does not exclude claims by Donald Frazier from coverage under the indemnity provision.

Frazier also asserts the trial court's decision converted the contract's indemnity clause into a release of U.S. National's liability. According to Frazier, no court has upheld an indemnity agreement in a contract used to impose a shifting responsibility for the costs "of one of the parties' *own personal injury or wrongful death claim.*" Frazier reads the indemnity provision in section 8.13.1 as extending indemnity only when a claim is made against U.S. National by a third party injured or killed as a result of U.S. National's negligence. Frazier claims the indemnity language does not extend to a claim brought by "a party (or in this case the legal heirs of the principal of a party)" to the contract.

However, as U.S. National points out, neither Donald Frazier nor his heirs were parties to the contract. The contract was between U.S. National and Frazier and reads: "To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project

Management Protective Liability insurance purchased by the Contractor . . . , the Contractor shall indemnify . . . .” Frazier provides no authority for its assertion that the indemnity clause does not apply to Donald Frazier as either an employee or president of Frazier. Frazier makes this same argument in a variety of guises, but again fails to provide any support for its assertion that the principal of a company is not a third party covered by the indemnity agreement.

In addition, although Frazier strives mightily to characterize the indemnity provision as construed by the trial court as a release, the indemnity provision is explicitly and unequivocally a provision to indemnify U.S. National for negligent acts toward third parties. Here, the indemnity provision of the contract does not relieve U.S. National of liability if the trier of fact finds it solely at fault in Donald Frazier’s death. Nor does indemnity apply if Donald Frazier’s injuries did not result from performance of work under the contract. In no sense is the indemnity provision an “express assumption of the risk . . . in the context of recreational activity where the participant pays a fee . . . and agrees to hold the organizer or sponsor of the event harmless.”

The trial court found the indemnity provision applied to Donald Frazier. The trial court did not determine whether U.S. National was solely responsible. This issue remains for trial.

UNCONSCIONABILITY

Frazier contends U.S. National’s attempt to expand the meaning of “claims, damages, losses and expenses . . . arising

out of or resulting from performance of the Work" to include Donald Frazier's death would yield an unconscionable result and should be disallowed. The trial court rejected this argument, finding the evidence before it did not support a claim of unconscionability.

The doctrine of contractual unconscionability has both procedural and substantive elements. The procedural element focuses on oppression arising from inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. This element generally takes the form of a contract of adhesion: "'"which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."'" (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071; *Ilkhchooyi v. Best* (1995) 37 Cal.App.4th 395, 409.)

Frazier argues it lacked any meaningful choice when entering into the contract. According to Frazier, U.S. National's legal department provided the contract and there was no discussion about the effect of the indemnity agreement. In addition, since Frazier was a tenant dealing with its landlord, "[t]his was obviously not an arm's length transaction." Frazier describes its relationship with U.S. National as "the definition of inequality of bargaining power." According to Frazier, there was no reasonable alternative if it wanted the work, and it was "obviously" compelled by its relationship with its landlord to sign a contract under whatever terms were presented.

However, as U.S. National points out, Frazier presents no evidence that it was not given an opportunity to negotiate terms of the contract, or that U.S. National presented the contract as a "take-it-or-leave-it" proposal. We agree. Although Mrs. Frazier testified that no one from U.S. National discussed the terms of the contract, she also testified she was not involved in contract negotiations. According to Mrs. Frazier, only Donald Frazier and his estimator, Joel Hudspedch, were involved in contract management. Frazier failed to provide any testimony by Hudspedch as to contract negotiations.

Nor did Frazier offer any evidence to support its claim that it was a David negotiating with a much larger Goliath. Apart from characterizing itself as a "small company dealing with its landlord that had a corporate legal office in Oregon," Frazier fails to support its assertion that it lacked any meaningful choice but to enter into the contract. Frazier merely asserts that, as a small construction company, it was eager for work and had a motivation not to upset its landlord. Such a characterization does not equate to evidence of unequal bargaining power.

The second, or substantive, element of contractual unconscionability pertains to an overly harsh allocation of risks or costs that is not justified by the circumstances under which the contract was made. (*Carboni v. Arrospide* (1991) 2 Cal.App.4th 76, 83.) Frazier claims the indemnity provision is substantively unconscionable because it forces Mrs. Frazier and her children to waive their wrongful death claim against

U.S. National. According to Frazier, "This is especially harsh in that no separate consideration was given for a promise to include any claim by Mr. Frazier under the indemnity language of Paragraph 8.13."

We disagree. The indemnity provision does not require Donald Frazier's family to waive anything. Their wrongful death claim will proceed, and the indemnity provision will only bar recovery if U.S. National can prove it was not solely responsible for Donald Frazier's death and that his injury "[arose] out of or [resulted] from performance of the Work." Such standard AIA contract indemnity provisions have previously been upheld. (*Continental Heller*, *supra*, 53 Cal.App.4th at p. 506.)

Frazier has failed to provide any evidence that the indemnity clause is procedurally or substantively unconscionable.

Finally, in an unrelated argument, Frazier contends Donald Frazier's death arose out of the physical configuration of the roof and that the court misinterpreted the "arising from" language of the indemnity clause. This interpretation, Frazier argues, led to improper and erroneous results.

The trial court made no such determination. The trial court determined the applicability of the contract, not the cause of Donald Frazier's injuries or death. In determining the contract applied, the trial court only found that "Donald Frazier was engaged in the performance of the work called for by the contract" when the roof collapsed. The trial court did not

find as a matter of law that Donald Frazier's injury arose from or resulted from the performance of this work.

DISPOSITION

The judgment is affirmed. U.S. National shall recover costs on appeal.

RAYE, J.

We concur:

DAVIS, Acting P.J.

HULL, J.